HOUSEHOLD

Retail Services

Via Facsimile ***202-452-3819***

January 29,2004

Jennifer **J.** Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, **N.W.**
Washington, **D.C.** 20551

*RE: Regulation Z - **Proposed** Rule, Docket # R-1167*
*Regulation B – Proposed Rule, **Docket** # R-1168*

Dear **Ms.** Johnson:

Thank you for the opportunity to comment on the proposed changes to Regulations Z and B (the "Proposed Rule") of the Board of Governors of the Federal Reserve System (the "Board"), implementing the Truth in Lending Act ("TILA") and the Equal Credit Opportunity Act ("ECOA. Household Retail Services ("HRS"), respectfully provides comments to **the** Proposed Rule.

HRS originates both open end and closed end private label credit. It provides in-house credit card programs for many nationwide retailers, as **well as** factory financing programs for many national powersports vehicle manufacturers. The open end credit **is** originated **by** Household Bank **(SB),** N.A. and the closed end credit is originated by powersports dealers and purchased by Household Retail Services, Inc., a state licensed finance company. Therefore, the Proposed Rule would affect all aspects of WRS' business.

Background:

The Board is proposing to amend the regulations cited above to provide **a** uniform definition of the term "clear and conspicuous" among the Board's regulations generally. Specifically, the **Board is** proposing incorporating into these existing rules the relatively new "clear and conspicuous" standard from Regulation P, which implements the privacy disclosure requirements of the Gramm-Leach-Bliley **Act.** The stated intention of this revision is to "help ensure that consumers receive noticeable and understandable information that **is** required **by** law in connection with obtaining consumer financial products and

sewices." In addition, the preamble expresses the belief that "consistency among the regulations should facilitate compliance by institutions."

HRS fully supports ongoing industry and regulatory efforts to provide useable, clear information to consumers regarding financial products. However, we fear that the changes contained in the Proposed Rules may fail to advance these shared goals. Moreover, because these changes could mandate the revision of virtually every document, advertisement, or page on a financial institution's website that are sent or used by consumers, the costs to the industry are potentially enormous, and should well exceed the Board's estimate under the Paperwork Reduction Act that "the revisions would not increase the paperwork burden of creditors." These compliance costs are compounded by the potential litigation exposure that could result from the elimination of decades of jurisprudence concerning disclosure standards under the Board's affected regulations. While costs alone may not constitute sufficient reason to withdraw a proposal that is intended to enhance consumer protection, we are also concerned that the Proposal lacks documentation or other explanatory information that demonstrates how the new standard will meet those intentions, or how it will facilitate compliance by affected financial institutions. In this regard, and as further discussed below, we respectfully disagree with the assertion that the standard expressed in Regulation P "articulates with greater precision" the duty to provide disclosures that consumers will notice and understand. With these comments in mind, we suggest that the Proposal be withdrawn in its entirety, and that any specific regulatory concerns regarding consumer disclosures be addressed on a case by case basis, as the Board has done in the past.[1]

Discussion

Initially, In its notice of rulemaking, the Board stales that the application of the "clear and conspicuous" definition in Regulation P to the disclosures required by Regulations B, E, M, Z and DD will provide "consistent guidance." However, due to the major differences in history between Regulation P and the other Regulations, HRS submits that this change is inappropriate.

Regulation P implements the privacy provisions of the Gramm-Leach-Bliley Act. The "clear and conspicuous" definition that the Board devised for that Regulation applies to only one consumer disclosure, a privacy notice with a singular purpose and intent. The definition was written specifically for that notice, with no existing case law, common usage or regulatory interpretation providing guidance on its

[1] See, e.g., 65 Fed. Reg. 58,903 (October 3,2000) (Final Rule implementing changes to Regulation Z s definition of "clear and conspicuous" as it applies to information in the Schumer Box.)

meaning. Also of particular note is that Regulation P contains no private right of action.

In contrast to Regulation P, Regulations Z, B, E, M and DD to which the Board is proposing to apply the Regulation P "clear and conspicuous" standard are well established with a body of accepted case law, common usage and regulatory interpretation. Moreover, unlike Regulation P, each of these other Regulations mandates numerous disclosures, not just one. Thus, to apply the Regulation P "clear and conspicuous" standards to all of these Regulations and to all of the disclosures that they mandate would result in the eradication of all of the existing guidance that has been provided by courts, commentators and regulators. In the case of Regulation Z, the existing guidance stretches back over 30 years,

More important, however, is that the language of the Proposed Rule is vague enough that reasonable minds can differ over whether or not it has been met. Thus, every customer document created by a financial institution would raise the potential of litigation. Which disclosures and which part(s) of a financial institution's document(s) are covered by the new rule, whether a word or phrase devised by the financial institution is more "definite" and "concrete" than one which another person might come up with, whether there are "wide margins and ample line spacing" in a document, whether a word is "key" and thus should be in boldface or italics, what "graphic devices" call attention to a disclosure, and many other topics are all subjective choices on which reasonable minds can differ. Without an existing body of law to provide guidance, all of these choices made by a financial institution for each consumer document that it produces could be challenged in litigation.

As an example of the potential impact of the Proposed Rule, 12 C.F.R. §226.13, the Regulation Z billing error notice provision, requires a creditor to (i) acknowledge the billing error notice within 30 days (§226.13(c)(1)), (ii) if a billing error occurred, mail a correction notice to the consumer (§226.13(e)(2)), (iii) if no billing error occurred, send the consumer an explanation of why no billing error occurred (5226.13(f)(1)), (iv) furnish the consumer with documentary evidence if the consumer requests it (§226.13(f)(2)), and (v) notify the consumer of the time when payment is due and portion of the disputed amount that the consumer still owes (§226.13(g)(1)). It is arguable (though uncertain) that the proposed rule would apply to all of these communications. As a result, lenders will need to make subjective determinations on a) how to craft a "plain language heading to call attention to the[se] disclosure[s];" b) which 'key" words would require "boldface or italics;" and c) which sentences in these letters would require "distinctive type size, style, and graphics devices, such as shading or sidebars, to call attention" to them. . Multiply that example by all of the other hundreds of disclosures and communications required by the regulations to which this rule

would apply, and the requirements (and potential for challenges in litigation) become daunting.

Currently, in the typical credit agreement, the mandated disclosures are reasonably combined and intertwined with contractual provisions. For instance, it makes sense when telling a credit card holder when their payment must be made, also to tell them what time of day their payment must arrive in order to be credited on that day. However, the Proposed Rule may negatively impact that type of logical organization. Under the rule. "the presence of this other information may be a factor in determining whether the 'clear and conspicuous' standard is met." Moreover, even if the information were combined, the required portion of the disclosure would have to "use distinctive type size, style and graphic devices, such as shading or sidebars, to call attention" to it. The result of meeting this mandate would be a credit agreement which, if logically arranged, could appear strange and confusing to the consumer, with multiple typefaces and sizes in the same sentence and/or shading appearing seemingly randomly throughout the document. Alternatively, the Regulation Z disclosures would have to be grouped together and emphasized, possibly overshadowing equally important contractual provisions[2].

Another potential issue with a redesign of credit agreements as they currently appear is that certain non-mandated contractual provisions have become common. As credit agreements have developed, a body of case law has developed along with them, which strongly suggests that certain contractual provisions (not mandated by Regulation) be emphasized in order to be given effect. Among these are change in terms provisions and arbitration clauses. Again the Proposed Rule presents the quandary of whether to make these types of provisions as prominent as the required disclosures, or risk that important contractual provisions would not being given effect if they are not prominent enough.

As a final illustration of the extent of the Proposed Rule, applying it to the so-called "triggering terms" disclosures found in $226.16 and 226.24 would result in advertisements that would look strange at best, and cost significantly more money to run. When a merchant advertises a product, even if credit is available to finance the product, the thrust of the ad is the product. The terms of any available credit are not necessarily more important than information about the product itself – they make up an integrated whole. The Proposed Rule would require merchants who advertise products together with available credit to make

[2] For instance, a collection fee (not a required disclosure) would not be emphasized and an overlimit fee (a required disclosure) would be emphasized. Many consumers would consider both to be equally important

some difficult and potentially expensive choices with respect to their advertisements.

In addition to potential litigation risk and customer confusion, probably the biggest unintended effect of the Proposed Rule is that it would require the review and rewrite of most customer letters, documents, and disclosures that a financial institution uses. Moreover, as discussed above, it is not clear that the results of the rewrite would necessarily be beneficial to consumers. Some anticipated effects are:

- The production of disclosures that are many pages long, leading to increased costs to the financial institution. This additional size would not necessarily lead to an increase in the number of consumers who read them;
- A re-emphasis or even de-emphasis of disclosures which have been required to be emphasized in the past (most notably, the §226.5a "Schumer Box"),
thereby potentially confusing consumers' expectations;
- Significantly longer periodic statements, significantly increasing postage costs for the financial institution and resulting in potential customer confusion;

For HRS open end credit programs alone, the costs of compliance would far exceed $3 million initially, and approximately $3 million per year would be added to future ongoing operating costs. Additionally, up front compliance efforts would require well in excess of six months to complete. This time estimate is in addition to required programming changes, and assumes no other product development work is required while the changes are being made.

In addition to the extensive review and change process that would be required of a financial institution under the Proposed Rule, the Proposed Rule would likely require the Board to revise Appendices G and H to Regulation Z to ensure that the model disclosures contained therein satisfy the new "clear and conspicuous" standard. Many financial institutions rely on the suggested forms in those appendices, which not only provide a needed safe harbor for lenders, but also consistency to consumers.

As a final matter, as all of the statutory requirements potentially impacted by the proposal contain provisions allowing for the recovery of attorney's fees in successful private litigation, recent experience indicates that many lenders will face the likelihood of significant litigation costs following the implementation of rules in the subjective format outlined in the Proposed Rule. We submit that some of these costs may be avoided by clearer, more specific guidance on particular disclosure issues, as discussed above.

Paperwork Reduction Act

In this section of the Proposed Rule, the Board estimates that the proposed definitional changes will create no annual cost burden on the banks affected by the changes. We respectfully disagree. As written, the new language effectively includes minimum typeface sizes, increased margins, and other requirements that would likely lengthen every printed disclosure made to consumers. Added length requires added paper at an additional cost. Additional paper creates additional weight, which requires additional postage. As noted above, the cost to HRS, just one U.S. business unit of HSBC Holdings, plc, is estimated at $3 million per year. It is quite possible, therefore, that the proposed changes could result in costs to the industry measuring in the billions of dollars.

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We appreciate the opportunity to comment on this proposal.

Sincerely,

David Melcer
Senior Counsel
Household Retail Services